No. 96-653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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May 23, 1997

PETITION FOR CERTIORARI FILED OCT. 22, 1996
CERTIORARI GRANTED MAR. 24, 1997

58 pp

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Note: The decision of the Court of Appeals under review is contained in the appendix to the petition for writ of certiorari at 2a-16a. The decision of the District Court addressing the Full Faith and Credit issue is contained in the appendix to the petition for writ of certiorari at 17a-39a.

RELEVANT DISTRICT COURT DOCKET ENTRIES

U.S. District Court
Western District of Missouri (Kansas City)

CIVIL DOCKET FOR CASE #: 91-CV-991

Baker, et al v. General Motors Corpo — Filed 11/06/91
Assigned to: Judge Joseph E. Stevens, Jr. — Jury demand:Plaintiff
Demand: $50,000 — Nature of Suit: 365
Lead Docket: None — Jurisdiction: Diversity
Dkt # in Cir Crt Jackson City is: CV91-24986

Cause: 28:1446 Petition for Removal- Personal Injury

11/6/91	1	Notice of Removal from Jackson County Circuit Court, Case Number: CV91-024986 - w/JS-44c. (pt) [Entry date 11/12/91]
11/14/91	4	ANSWER by defendant General Motors Corpo (jd) [Entry date 11/18/91]
3/31/93	41	MOTION by plaintiff to permit videotape depo of Ronald E. Elwell (kmc)
3/31/93	42	Suggestions by plaintiff in support of motion to permit videotape depo of Ronald E. Elwell [41-1] (kmc)
4/16/93	51	MOTION by defendant General Motors Corpo to exceed page limitation of suggs requirement (jg2)
4/16/93	52	Suggestions by defendant General Motors Corpo in opposition to motion to permit videotape depo of Ronald E. Elwell [41-1] (jg2)
4/29/93	59	Reply suggestions by plaintiff to motion to permit

videotape depo of Ronald E. Elwell [41-1] (dh) [Entry date 05/03/93]

5/14/93 67 Reply by defendant to plas' rply to sugg in opp to plas' mt to permit the depo of Ronald E. Elwell (kmc)

6/14/93 76 CERTIFICATE by plaintiff of service of Ntc to take Videotaped Deposition of Ronald Elwell (no date) (dh)

6/18/93 83 ORDER by Judge Joseph E. Stevens Jr. granting pla's motion to permit videotape depo of Ronald E. Elwell [41-1] granting pla's motion to take the videotape record the depo; denying dft's motion for protective order [80-1] (cc: all counsel) (gk) [Entry date 06/21/93] [Edit date 06/21/93]

6/18/93 84 Suggestions by plaintiffs' in opposition to dft GMC's motion f/proto & anticipated motion to stay Ronald Elwell's depo pending an appeal (gk) [Entry date 06/22/93]

6/23/93 86 MEMORANDUM by plaintiffs Re: Ronald Elwell deposition (gk)

6/23/93 90 Motion/Order for pro hac vice on behalf of Ronald Elwell by Jeffrey T. Meyers Receipt #: 6661 in the amount of $25.00 (gk) [Entry date 06/24/93]

6/25/93 91 REMARK: received from 8th Circuit that this matter is before the Court on petitioner GMC's Emergency Mt for Stay of Dist Court's order of 6/18/93 permitting a deposition to occur as scheduled on 6/23/93. After careful

consideration, the Court hereby denies petitioner's emergency mt for stay (dh) [Entry date 06/30/93]

7/2/93 94 CERTIFICATE by plaintiffs of service of Ntc to take videotaped depo of Ronald Elwell (gk) [Entry date 07/07/93]

7/23/93 109 MOTION by defendant General Motors Corpo in limine to exclude the "Ivey Document" (rs)

7/30/93 129 Suggestions by plaintiffs in opposition to motion in limine to exclude the "Ivey Document" [109-1] (kmc)

8/6/93 151 CERTIFICATE of transmission of depositions of Ronald Elwell taken on 7/23/93 on behalf of plaintiffs; Costs: $1070.00; Ronald Elwell taken 6/23/93 on behalf of plas; Costs: 1740.25; Ronald Elwell, taken on 7/22/93 on behalf of plas;

8/9/93 152 MOTION by defendant in limine to exclude or limit trial testimony of Ronald Elwell (dh)

8/9/93 153 MOTION by defendant for leave to file mt in limine out of time as to testimony of Ronald Elwell (dh)

8/20/93 175 MINUTE ENTRY: All parties and the jury again appear. Court instructs the jury. Closing arguments made by respective counsel. Court retires to deliberate, returning with a verdict in favor of plaintiffs and against defendant and assessing plaintiffs' damages at $11,300,000.00 Jury polled. Trial exhibits returned to respective counsel (gk) [Entry date 08/25/93]

8/20/93 177 Verdict: on the claim of plaintiffs Kenneth Baker & Steven Baker, by next friend Melissa Thomas, for the death of Beverly Sue Garner, against GMC, we, the undersigned jurors, find in favor of: Plaintiffs Kenneth Baker & Steven Baker, by next friend Melissa Thomas (gk) [Entry date 08/25/93]

11/8/94 194 CLERK'S JUDGMENT Entered on: 11/8/94 Jury verdict and Decision by Court; that pursuant to a hrg held 8/9/93 on pla's mt for Rules 37 sanctions adn the Court's order of 11/7/94, jgm is entered for plas and against dft on the issue of defectiveness in the design of the 1985 Chevrolet S-10 Blazer; that pursuant to the jury's verdict of 8/20/93 on plas' clm for the death of Beverly Sue Garner, jgm is entered for plas and against dft General Mtrs Corporation in the amt of $11,300,000.00 (cc: All Counsel) (kmc)

2/10/95 205 ORDER by Judge Joseph E. Stevens Jr. denying dft General Mtr's motion for judgment as a matter of law [196-1], denying motion for new trial [196-2], denying motion for remittitur [196-3], denying motion for new trial on the issue of damages [196-4] (cc: all counsel) (kmc) [Entry date 02/13/95]

3/7/95 206 NOTICE OF APPEAL by defendant General Motors Corpo from Dist. Court decision [205-1] Filed 2/10/95 Entered 2/13/95 Paid $ 105.00 Rct. # 83250 (kp) [Entry date 03/09/95]

RELEVANT COURT OF APPEALS DOCKET ENTRIES

U.S. Court of Appeals for the Eighth Circuit

Court of Appeals Docket #: 95-1604 Filed: 3/13//95
Kenneth Lee Baker, et al v. General Motors Corp., et al
civil - private - none
Appeal from: U.S. DISTRICT COURT, WESTERN MISSOURI

3/13/95 Civil Case Docketed. (dkm)

3/13/95 CERTIFIED copies notice of appeal, docket entries, 11/8/94 judgment, 2/10/95 order. [95-1604] [547149] (dkm)

10/6/95 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker FOR CAL. [95-1604] [626697] (sjo) [Entry date 10/10/95]

1/8/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker. PUT ON BENCH ON HEARING DAY. [95-1604] [658531] (sjo)

1/17/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [662502] (sjo)

4/24/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker. TO COURT. [95-1604] [701368] (sjo)

4/30/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [703903] (sjo) [Entry date

05/01/96]

5/13/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [709257] (sjo)

5/23/96 ERRATA sheet received for 28(j) citation filed by Appellees Kenneth Lee Baker, Appellees Steven Robert Baker 4/30/96, history # 703903. [95-1604] TO COURT. (sjo)

6/6/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [718297] (sjo)

6/14/96 THE COURT: C.A. Beam, Morris S. Arnold, Donald D. Alsop. OPINION FILED by C.A. Beam PUBLISHED. [95-1604] [721990] (ema)

6/14/96 JUDGMENT: C.A. Beam, Morris S. Arnold, Donald D. Alsop: The Judgment of the lower court is REVERSED and REMANDED in accordance with the opinion. [95-1604] [721998] (ema)

6/26/96 PETITION for REHEARING with suggestions for rehearing en banc. Filed by Appellees Kenneth Lee Baker, Appellees Steven Robert Baker, w/service 6/26/96. TO COURT. [95-1604] (lcd) [Entry date 06/27/96]

7/17/96 MEMORANDUM IN SUPPORT regarding petition for Rehearing with suggestion for rehearing en banc filed by Kenneth Lee Baker, Steven Robert Baker]726940-1]. Memo Filed by Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [734589] (lcd) [Entry date 07/18/96]

7/19/96 SUPPLEMENTAL MEMORANDUM IN SUPPORT filed (Order from U.S. D.C. of South Carolina) regarding petition for Rehearing with suggestion for rehearing en banc filed by Kenneth Lee Baker, Steven Robert Baker [726940-1] [735510]. TO COURT. [95-1604] (lcd) [Entry date 07/22/96]

7/24/96 JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [726940-1] filed by Kenneth Lee Baker, Steven Robert Baker. Petition for panel Rehearing is also denied. Judge McMillian and Judge Loken took no part in the consideration or decision of this case. [95-1604] [736769] (lcd) [Edit date 07/26/96]

8/6/96 MANDATE ISSUED [95-1604] (lcd)

10/31/96 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 10.25.96. Supreme Ct. Case No.: 96-653 [95-1604] [779517] (lcd) [Entry date 11/14/96]

2/18/97 U.S. Supreme Court letter received requesting the certified record of proceedings in the U.S. Court of Appeals for the 8th Circuit. [95-1604] (lcd) [Entry date 02/20/96]

2/20/96 Clerk letter sent requesting district court to transmit records to Supreme Court. [95-1604] (lcd)

2/20/97 Certified record of proceedings in the U.S. Court of Appeals for the 8th Circuit sent the U.S. Supreme Court. [95-1604] (lcd)

2/20/97 DOCKET NOTE: The Supreme Court was called on 2/20/97 regarding the pending motion for cert. Please

note that although the SC has requested the records in this case, cert has not yet been granted. [95-1604] (lcd)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Ronald Elwell
Plaintiff(s)

CASE NO: 91 115 946 NZ
HON: Cynthia Diane Stephens

-V-

General Motors Corp.
Defendant(s)
_____/

GRANTING IN PART, DENYING PART
INJUNCTIVE RELIEF

After the filing of papers and oral argument the Court for reasons more fully set forth on the record on September 13, 1991 and October 29, 1991 rules as follows:

THE COURT FINDS THAT GENERAL MOTOR'S REQUEST FOR PRELIMINARY INJUNCTION IS GRANTED IN PART AND DENIED IN PART.

Mr. Elwell and his agents servants employees and attorneys and those in active concert or in participation with them who receive actual notice of this order by personal services or otherwise are enjoined from consulting or discussing with or disclosing to any person any of General Motors Corporation's trade secrets confidential information or matters of attorney-client work product relating in any manner to the subject matter of any products liability litigation whether already filed or filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employments with General

Motors Corporation.

However, this Order does not modify any present or past Order of the Superior Court of Georgia in the case of Mosley -v- General Motors. This Court does not preclude compliance with the Orders of the Court in Mosley either directly or by inference. Production of materials in compliance with an Order of the Court in Mosley is not a violation of this injunction.

This injunction is granted because General Motors met its burden of proving that:

a. If the relief requested was not given General Motors could suffer irreparable injury.

b. There is no adequate remedy at law.

c. Public policy weighs in favor of the issuance of the injunction.

d. There is a likelihood of success on the merits of the claim filed.

The other relief requested by General Motors in Denied because General Motors failed to meet its burden under the Court Rule.

Nov 22, 1991 /s/ Judge Cynthia Diane Stephens
DATE JUDGE CYNTHIA DIANE STEPHENS

CDS/jh
112291

[True copy stamp]
/s/James R. Killeen
Deputy Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RONALD ELWELL,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
a Delaware Corporation,
and WILLIAM CICHOWSKI,

Defendants.
_____/

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Michelle J. Harrison (P41877)
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Charles C. DeWitt, Jr. (P26636)
Attorney for Defendants
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(313) 568-6953
_____/

STIPULATION

It is hereby stipulated by Plaintiff and Defendant General Motors Corporation as follows:

1. Ronald E. Elwell ("Elwell") began his employment with General Motors Corporation ("GM") on July 27, 1959.

2. On June 1, 1971 Elwell was transferred and assigned to the Engineering Analysis Group of the GM Engineering Staff located at the GM Technical Center in Warren, Michigan.

3. At all times during Elwell's employment with GM, he reported to the Ternstedt Division, Fisher Body Division or Engineering Staff Administrators as a Technical/Engineering employee.

4. From 1971 to 1989, one of Elwell's many design analysis engineering responsibilities was to assist employees of GM's Legal Staff and outside counsel in preparing responses to discovery requests and in the defense of GM's product litigation matters.

5. During the last eighteen years of his employment with GM, Elwell was: (1) at the request of GM Legal Staff members, provided confidential and non-confidential technical product information by employees of GM, and/or its outside counsel, which generally constituted proprietary information and/or trade secrets of GM; and (2) a party to many attorney-client and work product communications, both orally and in writing. As a party to these attorney-client communications, Elwell became aware of and had access to files and materials containing confidential and privileged information and work product of members of GM's Legal Staff and outside counsel.

6. During the course of his employment with GM, Elwell was utilized as an internal GM consulting expert for GM's Legal Staff and outside retained counsel in their anticipation of and/or in connection with product liability litigation. He also translated complicated technical information for attorneys or their non-technical employees at their request and participated in

discussions in which trial strategy was discussed. Elwell also testified as a fact witness and/or technical expert for GM, either by way of discovery depositions or at trial, approximately 80 times.

7. The aforesaid trade secrets, confidential information and matters of attorney-client privilege and work product are valuable assets of GM. The disclosure of confidential, non-privileged information or trade secrets to the public, or to competitors of GM could result in the loss of competitive advantages to GM. Disclosure of attorney-client or work product to litigation adversaries, or to the public, would result in the loss of said privileges and, thus, irreparably harm GM.

8. Because of the working relationship with GM's Legal Staff and outside counsel, depending upon the subject matter, it is extremely difficult for Elwell to determine whether his knowledge with respect to GM only comes from attorney-client and work product communications or from non-privileged communications.

9. On February 20, 1987, Elwell was placed on "Unassigned" status. Pursuant to the terms of the Agreement, Elwell was to be on "Unassigned" status for 28 months, effective April 1, 1987. Elwell agreed that at the conclusion of the 28 months (i.e., July 31, 1989), he would voluntarily retire from GM with 30 years of credited service.

10. The Agreement allowed Elwell to pursue outside business opportunities while on "Unassigned" status. Specifically, the parties agreed that Elwell would be utilized for consulting services in products liability litigation for GM and possibly others (so long as he did not act contrary to the interests of GM).

11. Pursuant to the terms of the Agreement, GM agreed that Elwell would not be required to report to regular daily work for

GM. Further, GM agreed to: (1) pay Elwell $4,440.47 per month during the 28 months that he was to be on "Unassigned" status; (2) credit the 28 months of "Unassigned" status to Elwell's overall length of service with GM; (3) continue Elwell's insurance coverages during his "Unassigned" status; and (4) provide Elwell with a retirement pension as provided by GM's early retirement policies.

12. Commencing on April 1, 1987, Elwell went on "Unassigned" status, and GM paid Elwell monthly in accordance with the Agreement.

13. Subsequent to April 1, 1987, Elwell was retained as an expert in various litigation matters by GM and others in the automotive industry.

14. After July 31, 1989, GM considered Elwell retired under the terms of the Agreement.

15. Prior to, as well as subsequent to August 1, 1989, Elwell refused to complete the necessary documents to process his retirement because Elwell believed GM failed to perform as provided.

16. Between August of 1989 and May of 1991, Elwell and GM attempted to reach a renegotiated Agreement. Despite such attempts, the parties did not reach a new Agreement.

17. On February 19, 1991, Elwell was noticed for deposition by counsel for the plaintiffs in a case pending in Georgia.

18. Subsequent to receiving the Elwell deposition notice in the Georgia case, GM's outside counsel held a deposition preparation meeting with Elwell. At this meeting, Elwell was advised that because of his employment dispute with GM that he should seek his own counsel. GM's outside counsel then

received a letter from Elwell's attorney.

19. On or about April 30, 1991, GM's outside counsel in the Georgia case met with Elwell's counsel to discuss the scope of Elwell's deposition. Among other things, the attorneys discussed GM's concern over the possibility that, given the nature of Elwell's work, Elwell might: (1) disclose confidential information belonging to GM; (2) disclose work product of counsel or other representatives of GM; and (3) disclose attorney-client privileged information belonging to GM. No agreement was reached with respect to how the parties would deal with deposition questions involving privileged information.

20. On May 3, 1991 Elwell was deposed by plaintiff's counsel in the Georgia case.

21. During his deposition, and over the objection of counsel for GM, Elwell criticized the competitive performance of a GM product.

22. On June 19, 1991, Elwell filed suit against GM in this Court. The Amended Complaint alleges that, among other things, GM: (1) discriminated against Elwell on the basis of a [illegible] handicap; (2) wrongfully discharged Elwell, without just [illegible]; (3) breached a contract to promote Elwell; and (4) interfered with Elwell's business relationships.

23. On August 8, 1991, GM filed a Counterclaim against Elwell. The Counterclaim alleges that: (1) Elwell breached the Agreement with GM; and (2) Elwell breached his fiduciary duties, and misappropriated privileged and confidential information. GM sought monetary, declaratory and injunctive relief against Elwell.

24. On August 15, 1991, Elwell was deposed for a second time in the Georgia case pursuant to a subpoena duces tecum.

During his deposition, and over the objection of counsel for GM, Elwell answered certain questions which, in the opinion of counsel for GM, disclosed work product of counsel for GM and attorney-client communications. With respect to the five bankers boxes of documents Elwell brought to the deposition pursuant to the subpoena, many contained privileged attorney-client communications, work product of counsel for GM, and confidential information.

25. Oral argument was heard on GM's preliminary injunction motion on September 13, 1991, and October 29, 1991. On those dates, after reviewing the briefs submitted by the parties and portions of the contents of the five Bankers boxes, the Court (Judge Cynthia Stephens) orally granted in part, and denied in part, GM's Motion.

26. On November 22, 1991, Judge Stephens entered an Order in accordance with her earlier rulings. A copy is attached as Exhibit A.

27. Elwell acknowledges that he owes GM a fiduciary duty not to disclose its confidential information, trade secrets, attorney-client communications, or work product.

28. Elwell acknowledges that GM has no adequate remedy at law.

29. Elwell agrees to the entry of the attached Permanent Injunction which: (1) enjoins Elwell from consulting or discussing with or disclosing to any counsel or any other person or entity any GM trade secret, confidential information, or matter of attorney-client privilege or work product relating in any manner to the subject of any litigation, whether already filed or yet to be filed, which Elwell received or had knowledge of during his employment with GM; (2) enjoins Elwell from testifying without the prior written consent of GM, either at deposition or trial, as

an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving GM as an owner, seller, manufacturer and/or designer of the product(s) in issue; and (3) requires all documents or other materials relating to GM and all copies thereof in the possession of Elwell, Elwell's attorney, or which have been given to others, that are of a confidential nature or which constitute or contain trade secrets, privileged information or attorney client or work product and relates to GM's business be immediately returned to GM.

30. Elwell agrees to dismiss his Complaint against GM and William Cichowski with prejudice, and without costs or attorney fees. Except as set forth in the Order Dismissing Plaintiff's Complaint and Granting Permanent Injunction, GM agrees to dismiss its counterclaim against Elwell with prejudice, and without costs or attorney fees.

GENERAL MOTORS CORPORATION

/s/ Ronald E. Elwell
Ronald E. Elwell

/s/ Charles C. DeWitt, Jr.
By: Charles C. DeWitt
Its Attorney

DYKEMA GOSSETT

/s/ Courtney E. Morgan, Jr.
Courtney E. Morgan, Jr. (P29137)
Attorney for Plaintiff

/s/ Charles C. DeWitt, Jr.
Charles C. DeWitt, Jr. (P26636)
Attorney for Defendants

CCD4449

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RONALD ELWELL,

Plaintiff, Civil Action No. 91-115946 NZ

vs.

GENERAL MOTORS CORPORATION,
a Delaware Corporation
and WILLIAM CICHOWSKI,

Defendants.
_____/

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_____/

AFFIDAVIT OF MAYNARD L. TIMM

NOW COMES the undersigned who, first being duly sworn, deposes and says as follows:

1.

My name is Maynard L. Timm. I am currently employed as an attorney on the Legal Staff of General Motors Corporation, Detroit, Michigan.

2.

I am more than 21 years of age and make this affidavit as to matters of my personal knowledge.

3.

Ronald Elwell was employed by General Motors from July, 1959 until August, 1989, at which time he completed 30 years of credited GM service.

4.

From 1971 until April, 1987, Mr. Elwell was employed as a member of the staff of Engineering Analysis at General Motors. As part of its responsibilities, Engineering Analysis monitors and studies the performance of General Motors' vehicles in the hands of GM customers, including specifically GM vehicles involved in collisions giving rise to products liability lawsuits. A major responsibility of Engineering Analysis is to serve as an in-house litigation support staff of experts, assisting General Motors' lawyers in the technical defense of product liability litigation.

5.

Elwell was one of the GM engineers responsible for fuel system analysis and the defense of post-collision fire cases while he was a member of Engineering Analysis, with particular responsibility for the analysis and defense of pickup truck fuel systems. In this capacity he testified numerous times in deposi-

tion and at trial in defense of the safety and crashworthiness of GM pickup truck fuel systems.

6.

In his capacity as an in-house litigation expert, Elwell did the following:

- Interpreted technical information which was made available to General Motors' Legal Staff and outside counsel;

- Responded to technical inquiries from GM's counsel responsible for defending post-collision fire cases;

- Assisted GM's lawyers in responding to discovery propounded in product liability cases;

- Reviewed government studies and technical literature on fuel system design and performance so as to advise the Legal Staff and GM fuel system engineers about new developments;

- Monitored governmental rulemaking in the field of automotive safety so as to advise the Legal Staff and GM fuel system engineers on new developments, and assisted in drafting GM's responses to proposed rules;

- Consulted with GM design engineers on future products, providing engineering judgments informed by litigation experience on issues of occupant safety;

- Routinely consulted with GM lawyers on strategic issues of litigation defense;

- Recommended and developed demonstrative evidence to

be used at trial of post-collision fire cases, including laboratory testing of components and crashtesting of entire vehicles;

- Assisted GM's Legal Staff and outside counsel in identifying and retaining outside experts and met with such experts to prepare strategy in the defense of products liability cases;

- Suggested lines of testimony and cross-examination on technical matters to rebut plaintiffs' experts;

- Frequently testified, both by affidavit and in person, in pretrial discovery disputes over the breadth of plaintiffs' discovery, the proper scope of relevant engineering issues and evidence in a given case, and General Motors' entitlement to confidential treatment for internal GM documentation;

- Appeared as an expert witness on behalf of General Motors at trials of products liability cases;

- In cases where he appeared as a witness, participated in major strategy sessions with GM's lawyers during trial;

- Provided technical assessments and gave generously of his engineering judgment in settlement evaluation discussions with GM's lawyers;

- Was an integral member of GM's products liability defense team;

- As an integral member of GM's products liability defense team, Elwell had access to, participated in, and gained knowledge of confidential attorney-client privileged and attorney work product information relating to GM's

defense of litigation, including specifically post-collision fire litigation.

7.

After a number of disagreements with his supervisors, Elwell eventually requested and obtained a retirement program with General Motors, pursuant to which he was given an "unassigned" status beginning in April, 1987 until August, 1989, when he attained 30 years of credited GM service. Pursuant to this arrangement, Elwell was to retire in August, 1989. During the 28 months between April, 1987 and August, 1989, Elwell ceased all active job duties at Engineering Analysis, although he continued to be paid $4,400 per month. During this same time Elwell was free to seek outside employment as an expert consultant and witness in automotive products liability cases, so long as he did not act contrary to the interests of GM, and to retain any payment he received for such independent services.

8.

Shortly before the expiration of the "unassigned status" period, Elwell complained to General Motors about the amount of the monthly stipend that he had previously agreed to accept pursuant to his retirement program. He demanded to be paid the amount of money he would have received had he worked full-time to age 65. He also alleged that GM had not lived up to its part of the retirement agreement, claiming that GM did not include him in a list of so-called outside expert consultants. When the end of the 28-month period arrived in August, 1989, Elwell refused to execute the appropriate paperwork for retired status and threatened to sue.

9.

In 1991, in a Georgia products liability suit involving a pickup truck fire, General Motors' counsel received a request from plaintiffs for the deposition of Elwell. Although by that time Elwell was no longer employed at General Motors, as an accommodation to plaintiffs, I contacted Elwell to inquire whether he was willing to appear voluntarily for the deposition and to schedule a date. General Motors' counsel also met with Elwell to discuss the deposition and to advise him that--given the pending employment dispute and Elwell's threats of suit--GM's lawyers could not represent Elwell personally at the deposition.

10.

Thereafter, Elwell retained independent counsel, Courtney Morgan of Detroit, Michigan, to represent him at his deposition. Morgan himself had previously represented plaintiffs in two major post-collision fire cases against General Motors, Burke v. General Motors Corporation, and Lehr v. General Motors Corporation.

11.

General Motors' counsel met with Morgan prior to the deposition to discuss how to handle objections of privilege and work product which--given Elwell's services as an in-house expert witness--could be expected to arise at the deposition. Morgan refused to agree to honor any such objections by General Motors, even pending resolution by the Court of GM's claims. This necessitated a court hearing in which the Georgia court, while denying General Motors' request for a court order as premature, cautioned Morgan to be sensitive to issues of privilege and work product.

12.

I was present at the deposition of Ronald Elwell taken by plaintiffs in the case of Moseley v. General Motors Corporation on May 3, 1991. During that deposition, Elwell gave opinion testimony which was markedly different from that he had given while he was employed as an in-house expert witness at General Motors. Although Elwell in 1971 had participated in and approved the design of the pickup truck fuel system in which the fuel tanks were located outside the framerails before it was released for production; and although he had defended the safety and crashworthiness of that fuel system on a number of occasions in sworn testimony, Elwell on May 3, 1991 criticized the performance of the GM pickup truck fuel system to be inferior to that of its competitors.

13.

When General Motors' counsel attempted to establish Elwell's motive and bias by questions exploring his employment relationship with General Motors, Elwell's counsel gave a blanket instruction that the witness should not answer any such questions. This instruction necessitated that a second deposition be noticed by General Motors Corporation.

14.

On June 18, 1991, Elwell, then a Michigan resident, was personally served in Ann Arbor, Michigan with a subpoena duces tecum for that second deposition (see Appendix E to General Motors' Memorandum in Support of Preliminary Injunction). On June 19, Elwell filed an employment lawsuit against General Motors in Wayne County, Michigan. (See Appendix D to General Motors' Memorandum.)

15.

I also attended the second deposition of Ronald Elwell taken in Moseley v. General Motors Corporation, which occurred on August 13, 1991, in Albuquerque, New Mexico, where Elwell had moved after being served with the Moseley subpoena.

16.

Elwell brought with him to the deposition five banker's boxes of documents which he said he was producing in response to the subpoena duces tecum. General Motors' initial review of those documents revealed that they contained a number of privileged communications and attorney's work product materials, as well as an extensive array of internal General Motors documentation which Elwell had taken with him when he left the Corporation.

17.

Plaintiffs' counsel in the Moseley case insisted on immediate access to the documents brought by Elwell to the deposition. General Motors objected, contending that the boxes contained some material which contained privileged and work product information. Elwell's lawyer stated that GM had waived any privilege or work product protection by subpoenaing the documents from Elwell and made the documents available to the Moseley plaintiffs. Plaintiffs' counsel in Moseley refused to defer his review even until General Motors could obtain a telephone ruling from the Georgia court.

18.

A telephone conference with the Georgia court then took place. The Georgia court ruled that General Motors had a right to review the documents in advance of plaintiffs' review and to set aside any documents it believed to be privileged for an in

camera determination of privilege and/or work product. The order incorporating that ruling is attached as Appendix F to General Motors' Memorandum in Support of Preliminary Injunction.

19.

After receiving the ruling of the Georgia court that General Motors had a right of first review before plaintiffs could have access to the documents, Elwell's attorney withdrew all of the documents from review and stated that they would need to review the documents to determine which, if any, were actually responsive to the subpoena. Elwell's attorney said that Elwell would retain custody of the documents.

20.

Between the time the documents were first produced and the time Elwell withdrew them, I had an opportunity briefly to review the categories of documents contained within the boxes brought by Elwell to the deposition. While it was impossible to review individually the hundreds of individual documents in the boxes, I determined that the boxes contained a wide variety of GM documents which Elwell must have wrongfully maintained possession of when he left the corporation. Many of the files appeared unrelated to either pickup trucks or Elwell's employment dispute (the two categories of documents requested by the subpoena). More particularly, the boxes contained at least the following types of documents:

1. Correspondence with GM's Legal Staff concerning cases to which Elwell was assigned while he was at Engineering Analysis.

2. Correspondence with GM's outside counsel in cases in which Elwell was retained as a consultant.

3. Collections of notes from meetings with GM counsel about litigation.

4. Numerous lists of lawsuits and settlements involving various vehicles.

5. Numerous lists of crashtests.

6. Internal presentations on design issues and litigation issues prepared by GM engineers.

7. Internal memoranda on design issues and litigation issues prepared by GM engineers.

8. Correspondence between the GM Legal Staff and other employees of General Motors.

9. Correspondence with GM engineers about design issues raised by pending and potential litigation.

10. Photographs of GM vehicle testing.

11. Films of GM vehicle testing.

12. General Motors crashtest reports.

21.

I believe that many of the documents reflecting communications between Elwell and GM's counsel are protected by both the attorney-client privilege and the work product doctrine. Other communications between the GM Legal Staff and GM engineers other than Elwell may similarly be protected. Still other information -- not privileged -- included within the document collection is internal, confidential, proprietary design information, for which GM routinely seeks a protective order of confi-

dentiality whenever it must be produced in litigation. Elwell himself submitted a number of affidavits when he was an employee of General Motors supporting the confidentiality of such information, testifying that such information is not available outside the corporation, and seeking protective orders of confidentiality.

Neither Elwell nor any other employee was or is authorized to unilaterally remove documents from the premises of General Motors and retain them for his personal benefit and use. Such documents are General Motors' property, not the property of individual employees. While an employee at General Motors, Elwell signed an agreement to safeguard the security of GM property and product information.

Further, affiant sayeth not.

/s/ Maynard L. Timm
Maynard L. Timm

Sworn to and subscribed before
me, this 29th day of August, 1991.

/s/ [illegible]
NOTARY PUBLIC
Wayne County, Michigan

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RONALD ELWELL,
Plaintiff,

Civil Action No. 91-115946 NZ

vs.

GENERAL MOTORS CORPORATION,
a Delaware Corporation
and WILLIAM CICHOWSKI,
Defendants.

/

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/

ORDER DISMISSING PLAINTIFF'S COMPLAINT
AND GRANTING PERMANENT INJUNCTION

At a session of said Court held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on August 26, 1992.

PRESENT: Honorable Richard P. Hathaway
Wayne Circuit Court Judge

Upon reading and filing of General Motors Corporation's Motion for Preliminary Injunction and supporting pleadings, the transcripts of September 13, 1991 and October 29, 1991, and for all the reasons stated on the record and in the Preliminary Injunction entered on November 22, 1991, and after consideration of the Stipulation between the parties, the Court finds and Orders as follows:

General Motors Corporation has met the requirements for permanent injunctive relief. Specifically, General Motors Corporation has met is burden in establishing that if Plaintiff disclosed various forms of privileged information he possesses General Motors Corporation would be irreparably harmed. Second, General Motors Corporation has established its burden of showing that its remedy at law is inadequate. Third, General Motors Corporation has established that the public interest weighs in favor of granting a permanent injunction.

Therefore, IT IS HEREBY ORDERED that Ronald E. Elwell BE AND HEREBY IS, ENJOINED from: (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment with General Motors Corporation; and (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial, as an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed, or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of this Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

IT IS FURTHER ORDERED that Ronald E. Elwell is required to immediately return to General Motors Corporation all documents or other materials relating to General Motors Corporation and all copies thereof in the possession of Ronald E. Elwell.

IT IS FURTHER ORDERED that Ronald E. Elwell's Complaint against General Motors Corporation and William Cichowski is hereby DISMISSED with prejudice, and without interest, costs or attorney fees.

[Stamp of Judge Richard P. Hathaway]
Hon. Richard P. Hathaway
Wayne Circuit Court Judge

[Clerk's stamp and signature, illegible]

No. 95-1604

In The United States Court of Appeals
For The Eighth Circuit

General Motors Corporation,
Appellant,

v.

Kenneth Lee Baker, et al.,
Appellees.

Brief of Appellant General Motors Corporation

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May 31, 1995

* * *

II. THE COURT VIOLATED THE FULL FAITH AND CREDIT CLAUSE BY PERMITTING RONALD ELWELL TO TESTIFY IN DISREGARD OF THE TERMS OF AN INJUNCTION ENTERED BY A MICHIGAN COURT.

General Motors is entitled to a new trial for the additional reason that the District Court erred in allowing Ronald Elwell to testify at trial, in violation of the Michigan state court injunction that prohibits him from testifying in cases involving General Motors products because he has previously wrongfully disclosed privileged information and has admitted that it is extremely difficult for him to distinguish between privileged and non-privileged information.

In this case, both before his deposition and at trial, General Motors objected to Elwell's being allowed to testify. (App. 56; Tr. 362, 372). General Motors argued that the Michigan injunction barring Elwell from testifying must be enforced by the District Court because that injunction is entitled to full faith and credit under the U.S. Constitution and 28 U.S.C. § 1738.[16]

Neither of the reasons given by the District Court -- (i) that the Michigan injunction violates Missouri public policy, or (ii) that the Michigan injunction is subject to modification by the court that issued it -- justifies denying its enforcement here.

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[16] A number of courts have considered whether this injunction is entitled to full faith and credit; those courts are split. Compare, e.g., Stephens v. General Motors, No. 303305 (Stanislaus County, Ca. May 24, 1995) (Unpublished, reproduced at Add. 43-45) (granting full faith and credit to the Michigan injunction) with Williams v. General Motors, 147 F.R.D. 270 (S.D. Ga. 1993). This case is the first appeal before a United States Court of Appeals to raise this specific issue.

A. There Is No Public Policy Exception To the Full Faith and Credit Clause for Judgments.

The District Court erred first and foremost because there is no "public policy" exception to the constitutional and statutory command of full faith and credit. The Constitution mandates that "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const., art. IV, § 1. Congress has implemented this Clause through a statute specifying that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. The full faith and credit command extends to all judgments, including equitable decrees such as injunctions. See, e.g., Gouveia v. Tazbir, 37 F.3d 295, 300-01 (7th Cir. 1994) (applying Full Faith and Credit Clause to "a valid, permanent injunction from an Indiana state court"). That much is apparent from the expansive wording of both the Constitution and the statute, which apply broadly to all "judicial proceedings." See also Restatement (Second) of Conflict of Laws § 201 (injunctions entitled to full faith and credit).

It has long been settled, at least since the Supreme Court's decision in Fauntleroy v. Lum, 210 U.S. 230 (1908), that judgments entered in the courts of other States are entitled to full faith and credit regardless of the contrary public policy, if any, of the forum State. As long as the state court that first renders judgment on the matter properly exercises its jurisdiction to do so, its final judgment has binding effect and must be afforded full faith and credit in the courts of other States.[17]

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[17] The Fauntleroy rule is subject to two minor exceptions, neither relevant here: full faith and credit principles do not apply to judgments based on penal laws; see Wisconsin v. Pelican Ins., 127 U.S. 265 (1888), or judgments involving the disposition of land, see Olmsted v. Olmsted, 216 U.S. 386 (1910).

Fauntleroy's rule remains controlling law. As the Restatement (Second) of Conflict of Laws explains:

> A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its own courts on the original claim.

Id. § 117 (emphasis added). The Supreme Court recently reiterated that there is no public policy exception to the full faith and credit due state court judgments: "The full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy." Howlett v. Rose, 496 U.S. 356, 382 n.26 (1990) (emphasis added); see also Morris v. Jones, 329 U.S. 545, 550-51 (1947).[18]

B. Even If There Were A Public Policy Exception, The Michigan Injunction Violates No Applicable Public Policy.

Even if there were a "public policy" exception to the Full Faith and Credit Clause for judicial orders -- which there is not -- no public policy would defeat the injunction here.

First, the District Court held that the Michigan injunction was inconsistent with the "broad discovery" allowed by Missouri's

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[18] The Court below may have been confused because the Supreme Court has recognized a "public policy" exception to application of another State's statutory law in choice-of-law decisions. That situation, however, has been clearly distinguished from the situation involving enforcement of judicial orders, which are binding throughout the nation. See Titus v. Wallick, 306 U.S. 282, 291 (1939); see also Nevada v. Hall, 440 U.S. 410 (1979).

rules of civil procedure. (Add. 21). But Missouri's rules of civil procedure do not apply in this case -- the Federal Rules of Civil Procedure apply in federal court, even in a diversity case. Hanna v. Plumer, 380 U.S. 460 (1965).

Second, no matter which set of discovery and/or evidentiary rules one looks to (Missouri's, Michigan's, or the Federal Rules), the Michigan injunction does not violate any public policy embodied in those rules. None of those sets of rules countenances the wrongful disclosure of privileged attorney-client and work-product information by a former employee. The Michigan court found, after a full adversary hearing on General Motors' motion for a preliminary injunction, a high likelihood that General Motors would suffer irreparable harm were Elwell to continue to violate its privileges. (App. 99). Moreover, these findings, and Elwell's strong propensity further to violate his fiduciary duties, were subsequently confirmed by Elwell himself, who stipulated that, in light of his nearly twenty years assisting the Legal Staff, it was extremely difficult for him to distinguish in his own mind what he knew from privileged sources and what he knew from nonprivileged sources. (App. 79). In light of these facts, the Michigan court's conclusion that Elwell should not be allowed to testify in any more cases against General Motors, is a reasonable remedy that is entirely consistent with public policy. Indeed, when a witness has been exposed to privileged materials as has Elwell, courts frequently bar the witness from testifying (through injunctions similar to the Michigan Order). See American Motors v. Huffstutler, 575 N.E.2d 116, 119 (Ohio 1991); see also Uniroyal Goodrich v. Hudson, 873 F. Supp. 1037 (E.D. Mich. 1994); Hayworth v. Schilli Leasing, 644 N.E.2d 602 (Ind. App. 1994). And where, as here, the former employee has clearly demonstrated his propensity to divulge privileged information, an injunction against further testimony is all the more reasonable.

Third, the suggestion by the District Court that General

Motors "bought" Elwell's silence (Add. 21) by settling his underlying employment action is totally unsupported by the record. To the contrary, the Michigan court had preliminarily enjoined Elwell well before the parties settled the underlying employment action. The mere fact that the preliminary injunction was made permanent at the same time that General Motors settled Elwell's employment claims does not make the continuation of the pre-existing injunction "bought." Indeed, the suggestion that the Michigan state court would allow General Motors to buy from it an injunction reflects an unwarranted suspicion of, and lack of respect for, the Michigan state courts.

In sum, even if there were a public policy exception to the requirement of full faith and credit, which there is not, the District Court erred in ruling that the Michigan injunction violated public policy.

C. The Fact That the Injunction May Be Modified By the Issuing Court Does Not Deprive It of Full Faith and Credit.

The District Court also ruled that the Michigan injunction would not be afforded full faith and credit because it is subject to modification under Michigan law. (Add. 25). This too was error.

The mere fact that a permanent injunction remains subject to modification in the state of issuance does not deprive it of finality for purposes of the constitutional command of full faith and credit. See Restatement (Second) of Conflict of Laws § 109 (1988 Revisions) ("A court will recognize or enforce a judgment rendered in a State of the United States that remains subject to modification in the State of rendition.").

The Supreme Court has held that "'the judgment of a state court should have the same credit, validity, and effect, in every

other court of the United States, which it had in the state where it was pronounced.'" Underwriters v. North Carolina Life, 455 U.S. 691, 704 (1982) (quoting Hampton v. McConnel, 16 U.S. (3 Wheat.) 378, 379 (1818)). Under Michigan law, no Michigan trial court except the court that entered the injunction may alter it. See Mich. Civ. R. 2.613(B) (judgment may be set aside or vacated "only by the judge who entered the judgment or order, unless that judge is absent or unable to act") (emphasis added).[19]

Accordingly, under Michigan law, the Elwell injunction may not be modified other than by the court that issued it. The injunction is entitled to that same force and effect in the District Court under the Full Faith and Credit Clause and 28 U.S.C. § 1738. Therefore, the injunction cannot be modified by the District Court any more than it could be modified by a different Michigan court.

Moreover, it was particularly wrong for the District Court to attempt to modify the Michigan injunction given that the Michigan court has on three separate occasions refused to modify the injunction. (Add. 24-25). The federal-law command of full faith and credit would be a dead letter if a judgment of a state court could be modified by a federal district court in the face of the state court's repeated refusal to modify the injunction itself.[20]

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[19] This case is therefore unlike Halvey v. Halvey, 330 U.S. 610 (1947). The Florida child custody decree in Halvey was not granted full faith and credit because "custody decrees of Florida courts are ordinarily not res judicata either in Florida or elsewhere, except as to the facts before the court at the time of judgment." Id. at 613 (emphasis added).

[20] There is also no basis for modifying the injunction for the additional reason that, as the District Court conceded, there has been "no classical 'change in circumstances' between the parties" justifying modification. (Add. 23).

D. Allowing Elwell To Testify Was Highly Prejudicial.

Allowing Elwell to testify in violation of the Michigan injunction was plainly prejudicial to General Motors. Elwell provided the critical foundation testimony for the admission of the Ivey Document against General Motors -- namely, that, contrary to the testimony of Mr. Ivey (Tr. 1474-75) -- who has repeatedly stated that he created the document on his own initiative -- there was supposedly a third page indicating that the document had been circulated and discussed with General Motors' officials. (Tr. 913). Without this testimony, there was no basis at all in the record to think that anyone at General Motors ever saw the Ivey Document, much less made design decisions based upon it.

Indeed, although General Motors need not make any such showing to prevail here on its Full Faith and Credit argument, Elwell's testimony also fell squarely within the zone of disclosure of privileged information that the Michigan injunction was designed to prevent. As his testimony makes clear (Tr. 412-13), whatever Elwell knew about the existence of the purported missing distribution page of the Ivey Document he knew from his litigation support responsibilities to the General Motors Legal Staff. Indeed, Elwell testified that the reason he was given the document was because it was relevant to his "job responsibilities" (Tr. 412), which included coordinating the response to discovery requests in lawsuits involving post-collision fuel-fed fires. That is precisely the sort of work-product and attorney-client information that the Michigan injunction was intended to prevent Elwell from wrongfully disclosing.[21]

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[21] Elwell's testimony concerning the purported source of the fire (Tr. 397), which was not given as an expert but rather was based on Elwell's experience working as an adjunct for the General Motors legal staff, was also prejudicial.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL NO. 95-1604

GENERAL MOTORS CORPORATION,
Appellant,

v.

KENNETH LEE BAKER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

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* * *

III. THE DISTRICT COURT PROPERLY PERMITTED RONALD E. ELWELL TO TESTIFY IN THIS CASE, CONTRARY TO AN "AGREED UPON" FOREIGN JURISDICTION'S INJUNCTION INCLUDED IN A SETTLEMENT OF AN EMPLOYMENT DISPUTE BETWEEN GM AND MR. ELWELL.

A. GM GROSSLY MISREPRESENTS, EXAGGERATES, AND CONCEALS NUMEROUS CRITICAL FACTS REGARDING THE MICHIGAN INJUNCTION AND RONALD ELWELL.

1. The Injunction.

The Michigan Injunction resulted from a signed Stipulation in which Ronald Elwell "agree[d] to" entry of an Injunction (App't App. 77-84) to finalize an employment dispute settlement with GM (App't App. 98-100). The Injunction, which generally bars Elwell's testimony in cases involving GM products (App't App. 99-100), is subject to at least two exceptions. Elwell can testify if GM consents (App't App. 99), and a "secret agreement" between Elwell and GM allows a court of competent jurisdiction to order Elwell's testimony (App'ee App. 1116).

2. The "Secret Agreement".

GM has concealed from this Court the Agreement associated with the employment dispute settlement between Elwell and GM resulting in the Stipulation and Injunction. The Agreement indicates an understanding that, despite the Injunction, Elwell can always testify when allowed by a court. This Agreement came to light in Willis v. Nissan Motor Co.,

Ltd.[70], when Elwell advised the Court that he could not voluntarily testify because of the Injunction, but could testify if ordered by a court of competent jurisdiction (App'ee App. 1115). Courtney Morgan, Elwell's personal attorney in the employment dispute settlement with GM, confirmed that the Agreement permitted Elwell to testify when allowed by a court of competent jurisdiction (App'ee App. 1123-24).

In addition to concealing the existence of the Agreement from this Court, GM has never produced the Agreement to Appellees in the instant case. However, the Agreement was produced by GM to the District Court in camera, and the District Court carefully considered the Agreement before allowing Elwell's testimony (App't Add. 21) (App'ee App. 1134, 1144).

3. Numerous Courts Throughout the United States Have Allowed Ronald Elwell's Testimony Notwithstanding the Injunction.

GM states that, "[a] number of courts have considered whether this injunction is entitled to full faith and credit; those courts are split." (GM's Brief 49, fn. 16) (emphasis added). GM misrepresents the facts. In truth, at least twenty-one courts throughout the United States, including six Federal District Courts, have allowed Ronald Elwell's testimony despite the Injunction[71]. These courts make it abundantly clear that the Full Faith and Credit Clause does not allow the Michigan Injunction

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[70] Willis v. Nissan Motor Co., Ltd., United States District Court for the Northern District of Georgia, Atlanta Division, No. 1:8I7-CV-1164-JTC (App'ee App. 1114).

[71] See Shoemaker v. General Motors Corp. (App't Add. 11), Williams v. General Motors Corp. (App'ee App. 1078), and 19 additional orders attached in Appellees' Supplemental Appendix.

to bar all future testimony by Elwell concerning GM[72].

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[72] A number of courts have noted the limited affect of the Michigan Injunction in their orders allowing Elwell's testimony.

- Shaffer-Kleoppel v. General Motors Corp. A decision in the Western District of Missouri, following the Baker decision, in which the court not only reaffirmed its analysis in Baker, but also allowed "opinion testimony" (App'ee Supp. App. 10).
- Carpenter v. General Motors Corp. In its order granting a motion to depose Elwell, the court stated "We hold that full faith and credit is not applicable to the judgment of a sister state involving different parties. Petitioners are not bound by the terms of a permanent injunction entered in an action in which they were not parties, in which they did not participate, in which their interests were not represented" (App'ee Supp. App. 8-9).
- Delarosa v. General Motors Corp. In granting a motion to depose Elwell, the court noted that '[t]he judgment signed by the Wayne County Circuit Court in my opinion is not entitled to full faith and credit as intended by the United States and Texas Constitutions because (a) it attempts to resolve future discovery matters that may arise between persons who were not parties before that court in the Michigan hearing; and (b) this was not an order entered as a result of a contested or 'litigated' hearing but was an agreed order" (App'ee Supp. App. 40).
- Meenach v. General Motors Corp. The court noted that "a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered." The court further indicated that "[w]here, as here, the Plaintiffs have made the requisite showing under Rule 26 that Elwell has relevant information that may lead to admissible evidence at trial, we hold that the Court may modify the Michigan injunction and permit Elwell's discovery deposition and/or testimony at trial." (App'ee Supp. App. 51, 55).
- Worden v. General Motors Corp. In reaffirming a lower court order refusing to enforce the Michigan Injunction, the court indicates that Elwell's previous testimony and depositions have made certain portions of his knowledge "a

In contrast, only one final order exists denying Elwell's testimony because of the Injunction, and it is distinguishable from the

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matter of public record." (App'ee Supp. App. 35).

- Colmenares v. General Motors Corp. In denying a motion for a protective order to bar the deposition of Elwell, the court cites to the "Shoemaker v. GM" decision, noting that the District court for the Western District of Missouri "showed some sound wisdom" in allowing Elwell's testimony (App'ee Supp. App. 6).
- Roberts v. General Motors Corp. In granting a motion to depose Elwell, the court indicated that "a Michigan Court ha[s] no jurisdiction over the subject matter of what testimony a witness will, or will not, give in the State of Georgia." (App'ee Supp. App. 21).
- Ruskin v. General Motors Corp. In granting a motion to depose Elwell, the court noted that of fourteen cases seeking Elwell's deposition, courts in twelve cases rejected GM's argument that the full faith and credit clause enjoined Elwell's testimony against GM, and permitted Elwell's deposition. The court further indicated these cases "are all exactly on point, and together constitute a powerful argument to permit Elwell's deposition." Finally, the court indicated that "the Michigan injunction involves a blanket prohibition that contravenes Connecticut public policy and hence is not entitled to full faith and credit." (App'ee Supp. App. 58-61).
- Williams v. General Motors Corp. In granting a motion to depose Elwell, the court indicated that "a Georgia court may modify the Michigan court's decree without violating the Full Faith and Credit Clause." The court further indicated that "the public interest -- which must be weighed in any consideration of injunctive relief -- is not served in this instance by prohibiting Elwell from testifying in Georgia as to matters not within the scope of an attorney-client or work-product privilege ... Any interest GM might have in silencing Elwell as to unprivileged ... matters is outweighed by the public interest in full and fair discovery." (App'ee App. 1084).

instant case[73]. Contrary to GM's assertion, the courts are not "split" on this issue.

4. Ronald Elwell Has Never Wrongfully Disclosed Any Privileged GM Information.

A recurring theme in GM's Brief is that Ronald Elwell has a "propensity" to wrongfully disclose privileged GM information (App't Brief 49, 52-53). In fact, GM asserts that the injunction was entered because Elwell:

> ... previously disclosed privileged attorney-client and work-product communications and because Elwell has admitted in court that it is extremely difficult for him to distinguish between what he knows from privileged and unprivileged sources.

App't Brief 20. This claim misrepresents the basis of the Injunction[74]. GM also asserts that Elwell wrongfully disclosed privileged GM information in the case of Moseley v. General

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[73] Harris v. General Motors Corp., Superior Court of Ventura County, California, No. 111342 (App'ee App. 1070). Harris is completely distinguishable from the twenty-one cases allowing Elwell's testimony. In Harris, Elwell had consulted with GM and was named by GM as an expert witness. Thus, Elwell was part of GM's defense team. Another trial court, Stephens v. General Motors Corp., Superior Court of Stanislaus County, California, No. 303305, prohibited Elwell from testifying, however, it is on appeal.

[74] The Injunction includes no reference to previous wrongful disclosures by Elwell, and the Stipulation preceding the Injunction indicates that it is merely the "opinion of counsel for GM" that Elwell disclosed privileged GM information (App't App. 82). GM also overstates Elwell's alleged difficulty in distinguishing knowledge from privileged and unprivileged sources, as the Stipulation indicates that GM"s blanket assertion is only true "depending upon the subject matter." (App't App. 79).

Motors Corp.[75] (App't Brief 21-22). However, GM neglects to mention that the Injunction specifically indicates that any disclosure by Elwell of privileged GM information in the Moseley case was not a violation of the Injunction (App't App. 100)[76].

In short, GM makes numerous statements regarding Elwell's alleged "propensity," but fails to cite even one instance where a court has found that Elwell wrongfully disclosed privileged GM information. In fact, GM has never brought an action pursuant to the Injunction against Elwell for wrongfully disclosing privileged GM information, even though at least twenty-one courts have allowed Elwell to testify notwithstanding the Injunction.

5. Ronald Elwell Had Numerous Duties During His Employment with GM Which Were Not Litigation-Related, and GM Greatly Exaggerates Its Claims that Elwell's Knowledge is Protected by the Attorney-Client and Work-Product Privileges.

GM implies that Ronald Elwell only had litigation-related duties during his employment with GM (App't Brief 19-20). This is yet another misrepresentation by GM. During Elwell's approximately thirty years with GM, his many duties included participation in research and studies of vehicular fires and working to improve GM product performance (App'ee App. 1107-08), performing research with the Engineering Analysis Group and reviewing legislation impacting vehicles (App'ee

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[75] Moseley v. General Motors Corp., Fulton County, Georgia, No. 90V-6276.

[76] The preliminary injunction entered in Elwell's employment dispute with GM also specifically stated that any disclosure by Elwell of privileged GM information in the Moseley case was not a violation of the preliminary injunction (App't App. 96).

App. 1107), and reviewing literature on vehicle performance and advising GM advertising staff regarding product use (App'ee App. 1107). This brief list indicates Elwell had numerous non-litigation-related duties.

Moreover, GM's claims that Elwell's knowledge is protected by the attorney-client and work-product privileges are greatly exaggerated (App't Brief 19-21). The Moseley case, supra, is an excellent example. During Elwell's first deposition in the Moseley case, he testified for two days and 370 pages before GM's counsel made a single attorney-client or work-product objection, despite GM's counsel's statement on the record that she would object to any questions invading GM's attorney-client or work-product privileges (App'ee App. 1108). Also, GM's counsel in the Moseley trial made only three attorney-client objections in approximately 580 pages of Elwell testimony, none of which were sustained by the Court (App'ee App. 1108).

B. THE DISTRICT COURT CORRECTLY RULED THAT THE MICHIGAN INJUNCTION IS NOT ENTITLED TO FULL FAITH AND CREDIT IN MISSOURI BECAUSE: THE INJUNCTION IS MODIFIABLE AND CONSTITUTES A VIOLATION OF PUBLIC POLICY.

1. The Iniunction Is Not Final and Is Always Modifiable Pursuant to Michigan Law.

The entire thrust of GM's argument is that courts are required to mechanically and without question extend full faith and credit to the Injunction. In essence, GM argues that the Injunction is entitled to "fuller" faith and credit in Missouri than it would receive in Michigan. That is clearly not the law. A court in a sister state is only required to give an injunction the same credit, validity, and effect that it would receive in the state

in which it was entered. Underwriters Nat'l Assoc. Co. v. North Carolina Life & Accident & Health Insurance Assoc., 455 U.S. 691, 704 (1982).

The Supreme Court of Michigan has expressly held that, "'[A] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.'" First Protestant Reformed Church v. DeWolf, 100 N.W.2d 254, 257 (Mich. 1960) [quoting United States v. Swift & Co., 286 U.S. 106 (1932)]. Michigan Courts have also made it clear that, "an injunction is always subject to modification or dissolution if the facts merit it." Opal Lake Assoc. v. Michaywe' Limited Partnership, 209 N.W.2d 478, 485 (Mich. App. 1973). In addition, the United States Supreme Court indicated it was "established long ago that even an injunction entered by consent of the parties ... is always modifiable" and this is true even where there is no express reservation of the power to modify because:

> power there still would be by force of principles inherent in the jurisdiction of chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need ... [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong.

Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 782 (1st Cir. 1988), cert. denied, 488 U.S. 1030 (1989).

The Injunction in the instant case is, without question, "directed to events to come", as it expressly purports to control Ronald Elwell's testimony in, "any litigation, whether already filed or filed in the future" (App't App. 99). In view of the modifiable nature of injunctions recognized by both the Supreme Court of Michigan and the United States Supreme Court, the

Injunction in the instant case would apparently be subject to modification by the Michigan Court[77]. The modifiable nature of the Injunction is further emphasized by the clause allowing GM to bypass the effect of the Injunction by consenting to Elwell's testimony (App't App. 99), and by the "secret agreement" allowing courts to order Elwell's testimony (App'ee App. 1115). Because the Injunction was clearly subject to modification by the Michigan Court, and because courts are only required to give an injunction the same credit as the state they are entered in, the District Court correctly found that the circumstances mandated the Injunction not be given full faith and credit in Missouri.

2. The Injunction Violates Missouri Public Policy.

The Michigan Injunction amounts to a blanket concealment of relevant information possessed by Ronald Elwell. Thus, the Injunction prevents the full and fair discovery of relevant, non-privileged information, and is contrary to public policy as expressed in both the Federal Rules of Civil Procedure and the Missouri Rules of Civil Procedure. The United States Supreme Court has recognized public policy limitations on the Full Faith and Credit Clause, stating that:

> [i]t has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy.

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[77] GM points out that the Michigan Court has declined to modify the Injunction on three separate occasions (App't Brief 55). However, GM fails to mention that none of those occasions involved a situation where the Injunction was challenged by a third party requesting discovery (App't Add. 25).

Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U.S. 493, 502 (1939) (emphasis added); Nevada v. Hall, 440 U.S. 410, 422 (1979). Both Federal and Missouri courts have recognized certain implicit policies in their procedure rules[78].

Appellees clearly have a right to discover non-privileged information possessed by Elwell. However, the Injunction prohibits Elwell from testifying "as a witness of any kind ... in any litigation already filed, or to be filed in the future, involving General Motors Corporation ..." (App't App. 99-100). This prevents Appellees from discovering any information possessed by Elwell, privileged or not privileged. In addition, Appellees were not parties to the proceedings resulting in the Injunction, and it is difficult to see how the Injunction could affect their rights. Because the Injunction prevents discovery of non-privileged information, in contravention of the Missouri Rules of Civil Procedure[79], the Injunction violates Missouri public policy and is not due full faith and credit.

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[78] Discovery under the Rules changed the entire concept of litigation from a cards-close-to-the-vest approach to an open-deck policy. It seeks to facilitate open and evenhanded development of the facts underlying a dispute, so that justice may be delivered on the merits and not shaped by surprise or like tactical stratagems.

American Floral Services, Inc. v. Florists' Transworld Delivery Assoc., 107 F.R.D. 258, 260 (N.D. Ill. 1985).

> [c]ourts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is "relevant" to the proceedings and subject matter not protected by privilege.

State v. Koehr, 831 S.W.2d 926, 927 (Mo. 1992) (en banc).

[79] "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Mo.R.Civ.P. 56.01(b)(1).

C. THE DISTRICT COURT PROPERLY ALLOWED RONALD ELWELL TO TESTIFY REGARDING THE "IVEY DOCUMENT."

GM generally complains that it was prejudiced by Elwell's testimony regarding the "Ivey Document" (App't Brief 24). GM deceptively indicates that Elwell's testimony about the "Ivey Document" constituted disclosure of privileged information because he learned of it through his "job responsibilities." (Tr. 412). However, Elwell's "job responsibilities" included a wide variety of non-litigation-related activities. GM also repeatedly asserts that Edward Ivey created the Document on his own initiative, that Ivey never distributed the Document to anyone within GM, and that there was never a third page to the Document indicating to whom within GM it was distributed (App't Brief 24-25). GM ignores that these were all matters for the jury to determine as triers of fact. This Court has consistently held that determination of witness credibility is a matter best left to the jury. Walker v. Jackson National Life Ins. Co., 20 F.3d 923, 925 (8th Cir. 1994); Piotrowski v. Southworth Products Corp., 15 F.3d 748, 753 (8th Cir. 1994). The jury had a full opportunity to judge Ivey's credibility and weigh his testimony against Elwell's testimony[80]. The jury obviously believed Elwell's testimony, and the jury's determination should not be disturbed.

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[80] Compare Ivey's testimony (Tr. 1467-79, 1485-92) with Elwell's testimony (Tr. 398-420, 426-27).

No. 95-1604

In The
United States Court of Appeals
for the Eighth Circuit

General Motors Corporation,
Appellant,

v.

Kenneth Lee Baker, et al.,
Appellees.

Reply Brief of Appellant General Motors Corporation

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Excerpts from Reply Brief of Appellant General Motors Corporation (General Motors Corporation v. Kenneth Lee Baker, et al. (8th Cir. No. 95-1604)

II. THE MICHIGAN INJUNCTION BARRING RONALD ELWELL'S TESTIMONY IS ENTITLED TO FULL FAITH AND CREDIT.

The Michigan injunction barring Ronald Elwell from testifying is entitled to full faith and credit under the Constitution and the implementing federal statute. None of the reasons offered by appellees for denying the Michigan injunction full faith and credit is proper under the controlling decisions of the Supreme Court.

Appellees begin by making the unwarranted and inappropriate suggestion that the Michigan injunction is a "purchased" order of the court that is subject to "secret" codicils (Baker Br. 51-52).[14] Aside from the impropriety of thus impugning the integrity of the Michigan court, this claim is false. The Michigan court entered a preliminary injunction on the merits on November 22, 1991, and entered a permanent injunction, also on the merits, on August 26, 1992. (See App. 98-100). Both orders were entered based on the record evidence in that case, including evidence developed at a preliminary injunction hearing and stipulations of fact by the parties. After considering this

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[14] The so-called "secret agreement" provision trumpeted by appellees was merely a provision that Elwell subsequently bargained for, out of concern that conflicting jurisdictions might place him in an untenable position. General Motors thus agreed that if Elwell testified in a proceeding because he was ordered to do so by some other court, that action alone would not necessarily constitute a violation of the settlement agreement. This provision, however, does not and could not lessen the independent force of the Michigan injunction.

evidence, the Michigan court specifically held that "the public interest weighs in favor of granting a permanent injunction." (App. 99).

Appellees also seek to reargue issues that were presented to the Michigan court, such as the nature of Elwell's duties during his employment with General Motors and the extent to which Elwell has wrongfully disclosed privileged information about General Motors (Baker Br. 54-56). These issues were considered and determined by the Michigan court when it entered a permanent injunction, and do not undercut in any respect the constitutional requirement that full faith and credit must be given to that order.[15]

Appellees' two legal arguments were addressed in our initial brief (GM Br. 49-56), and thus only a brief reply is in order here.

First, as to the supposedly "modifiable" nature of the Michigan injunction, appellees' argument amounts to a bare claim that no judicial order granting injunctive relief should be entitled to full faith and credit. Because any injunction could theoretically be modified at some future date, no other court would be required to honor such an order if it did not wish to do so. But that is emphatically not the law. See, e.g., Gouveia, 37 F.3d at 300-01; Restatement (Second) of Conflict of Laws § 102 (injunctions are entitled to full faith and credit). And it is

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[15] See, e.g., Gouveia v. Tazbir, 37 F.3d 295, 300-01 (7th Cir. 1994) (giving full faith and credit to a permanent injunction entered by an Indiana state court). Appellees are correct that a majority of state and federal trial courts thus far have failed to give full faith and credit to the Michigan injunction. But see Stephens v. General Motors, (GM Br. 49); Harris v. General Motors, (Baker Br. 54); Smith v. General Motors, No. 454255-1 (Fresno Cty., Ca. 1995). In any event, this is the first case in which a federal appeals court has considered on appeal the proper legal analysis under the constitutional and statutory provisions.

significant that the Michigan court which issued the injunction has refused, on three separate occasions, to revisit it upon request. (Add. 24-25). Although appellees make the cursory argument that those refusals are inapposite (Baker Br. 57 n. 77), it is telling that appellees themselves have never sough modification from that court. Instead, they have preferred to press an improper collateral attack on the Michigan injunction, in utter disregard of the dictates of the Full Faith and Credit Clause.[16] But under Michigan law, which governs the issue of modification here, only the issuing court can alter its own injunction. (see GM Br. 54-55).

Second, appellees' public policy argument simply misstates the law. When a judgment is entered by a court of another State, it is entitled to full faith and credit regardless of any contrary public policy of the forum State. Fauntleroy v. Lum, 210 U.S. 230, 236-37 (1908); Howlett v. Rose, 496 U.S. 356, 382 n.26 (1990) (citing Fauntleroy).[17] Federal courts do not have license to ignore State-court judgments. Moreover, there is no basis for the public policy argument in fact, even if there were some basis for it in law. (GM Br. 52-53).[18]

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[16] The impropriety of this collateral attack is shown also by the District Court's express acknowledgment that "no classical 'change in circumstances' between the parties" justified modification. (Add. 23).

[17] The two specific exceptions to this general rule, along with the "public policy" exception to enforcement of another State's statutory law (see GM Br. 51 nn. 17 & 18), have nothing to do with this case.

[18] In our initial brief, we also explained why Elwell's testimony was prejudicial so as to require reversal on this ground (GM Br. 23-25, 55-56). Although appellees contend that Elwell's testimony was proper (Baker Br. 59-60), they do not dispute that the testimony, if improperly given, was prejudicial to General Motors in this case.